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Hon. Michael E. Capuano
Congress of the United States
House of Representatives
1530 Longworth Building
Washington, D.C. 20515-2108

Re: Responding to your letter of December 21, 2005 regarding Constitutional Law questions about the scope of Executive Authority to Conduct Warrantless Surveillance

Date: January 9, 2006

Dear Congressman Capuano:

I am delighted to offer any assistance you might find helpful. Please feel free to share any of my material with whomever you see fit. My office email address is espahn@faculty.nesl.edu.

Briefly there are 3 key points in analyzing the scope of executive branch powers as I understand it.

1. The President does not have extra-legal or extra-constitutional authority even when acting in his capacity as Commander in Chief or Chief Diplomat, during wartime or emergencies.

There are a number of U.S. Supreme Court cases addressing this question over the years. Probably the most significant citation in modern times is to the Supreme Court's rejection of President Harry Truman's efforts to seize and operate steel mills during the Korean Conflict. *Youngstown Sheet and Tube v. Sawyer (the Steel Seizure Case)*, 343 U.S.579 (1952).

A) Rejecting President Truman's assertion of expanded powers as Commander in Chief during a "grave emergency", Justice Hugo Black stated:

"It is clear that if the President had authority to issue the order he did [to seize and operate the steel mills], it must be found in some provisions of the Constitution....The contention is that presidential power should be implied of the aggregate of his powers under the Constitution. ...Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property...this is a job for the Nation's lawmakers, not for its military authorities." 343 U.S. at 587.

The analogy between seizing private property and invading privacy interests through eavesdropping is not perfect, however I think it would be difficult to argue that private property interests are protected at a significantly greater level than privacy interests from warrantless eavesdropping.

B) Also rejecting President Truman's claim of extra-legal power as Commander in Chief during wartime emergencies, Justice Robert Jackson in his famous and oft cited concurring opinion provides a three part legal test for measuring the scope of Presidential power, depending on whether Congress has authorized, forbidden or is silent regarding the exercise of Presidential authority. Justice Jackson emphasized that the exercise of power in wartime by the Commander in Chief is subject to the powers explicitly granted to Congress by the Constitution.

"...[T]he principle that ours is a government of law, not of men, and that we submit ourselves to rulers only if under rules." 343 U.S. at 646.

"I am quite unimpressed with the argument that we should affirm possession of them [emergency powers in the Commander in Chief during wartime] without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction." 343 U.S. at 653.

"With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first to give them up." 343 U.S. at 655.

The *Steel Seizure Case* continues to be good law today, Justice Jackson's concurring opinion is often relied upon by the current Court, and can certainly be relied upon to challenge President Bush's claims of extra-legal authority during wartime or emergencies. Obviously this is just a beginning point for a more thorough legal analysis, but in terms of the political debate and public awareness, the *Steel Seizure Case* provides an excellent starting point to emphasize the constitutional limits on the President's authority under the rule of law.

2. The second issue is whether the Congressional Authorization for the Use of Military Force (AUMF) in Afghanistan and in Iraq can be construed as implicit authorization for the President to conduct warrantless surveillance. Assuming that the President does not have some extra-legal, extra-constitutional authority, any claim of Presidential legal authority requires, under the *Steel Seizure* analysis in Justice Jackson's concurring opinion, some level of authorization from Congress.

The crucial issue here, which I think is often missed in the public debates is whether Congress itself has the constitutional power to authorize warrantless searches. If Congress does not itself have the constitutional power to authorize warrantless searches, then of course Congress cannot delegate a power it does not possess. It doesn't really matter what the AUMF says or does not say. The question must be whether Congress **could** authorize warrantless searches, before addressing the question of whether the AUMF did or did not constitute such a delegation of such power to the President.

Because the requirement of a warrant prior to surveillance activity is based in the Bill of Rights as interpreted by the Supreme Court, Congress cannot by statute amend the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Congress does not have authority to suspend the Bill of Rights by statute. Since Congress does not possess this power, Congress cannot delegate a non-existent power to the President.

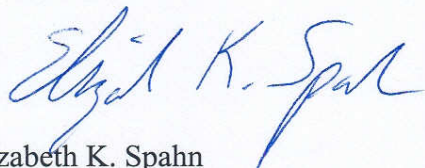
3. Congress does have the Constitutional power to suspend the Writ of Habeas Corpus. Article I section 9 clause 2 provides: "The privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." Certainly one could argue that the 9/11 attacks constitute an "invasion", therefore Congress probably does have the power to suspend the Writ of Habeas Corpus should it choose to do so. The power to suspend the Writ of Habeas Corpus is not given to the President, it is explicitly Congress' power.

However the U.S. Supreme Court has recently and explicitly stated that any suspension of the Great Writ should not be inferred from general statutory language. If Congress wishes to suspend the Writ of Habeas Corpus, according to the Court, Congress must do so explicitly. Implicit suspension of the Writ would raise "serious constitutional questions" according to the Court's opinion. *INS v. St. Cyr*, 533 U. S. 289 (1983). "...the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law strongly counsels against adopting a construction that would raise serious constitutional questions." 533 U.S. at .

Because the AUMF does not explicitly suspend the Writ of Habeas Corpus, and in light of the *INS v. St. Cyr* case coupled with the historic significance of the Great Writ to the Framers of the Constitution, I do not believe that the Court would lightly regard an authorization to use "reasonable force" as an implicit suspension of the Great Writ. The dissenting Justices in *INS v. St. Cyr* (Justice Scalia, joined by the late Chief Justice, Justices O'Connor and Thomas) advance a novel view of the Suspension Clause, which would merit a much more detailed analysis in litigation. However for purposes of public debate, the Opinion of the Court in *St. Cyr* is now controlling law. Suspension of the Writ of Habeas Corpus is a Congressional power, and requires explicit action from Congress; it cannot be inferred from general provisions in statutes or other Congressional resolutions.

If you or any member of your staff would like further research, or a more detailed analysis of specific constitutional questions, I would be honored to provide any assistance. Thank you for your efforts to exercise your powers so responsibly.

Sincerely,



Elizabeth K. Spahn
Professor of Law